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In the Supreme Court of the United States

OCTOBER TERM, 1982

UNITED STATES OF AMERICA, PETITIONER

v.

HARRISON P. CRONIC

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE UNITED STATES

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QUESTION PRESENTED

Whether the court of appeals correctly reversed respondent's convictions on the ground that he did not receive effective assistance of counsel at trial, without identifying any error by counsel—much less a serious dereliction that fell outside the range of competence demanded of attorneys in criminal cases—and without finding any prejudice to respondent.

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In the Supreme Court of the United States

OCTOBER TERM, 1983

No. 82-660

UNITED STATES OF AMERICA, PETITIONER

v.

HARRISON P. CRONIC

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE UNITED STATES

OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a-7a) is reported at 675 F.2d 1126.

JURISDICTION

The judgment of the court of appeals (Pet. App. 8a) was entered on April 19, 1982. A petition for rehearing was denied on July 16, 1982 (Pet. App. 9a). On September 9, 1982, Justice White extended the time within which to file a petition for a writ of certiorari to and including October 14, 1982. The petition was filed on that date and granted on February 22, 1983 (J.A. 123). The jurisdiction of this Court rests upon 28 U.S.C. 1254(1).

CONSTITUTIONAL PROVISION INVOLVED

The Sixth Amendment to the United States Constitution provides in pertinent part:

> In all criminal prosecutions, the accused shall enjoy the right * * * to have the Assistance of Counsel for his defence.

STATEMENT

1. On February 5, 1980, respondent and co-defendants Wylie Merritt and Carolyn Cummings were indicted in the United States District Court for the Western District of Oklahoma on 13 counts of mail fraud in violation of 18 U.S.C. 1341 and 2.[1] The indictment charged that respondent and the co-defendants had engaged in a check-kiting scheme between banks in Tampa, Florida and Norman, Oklahoma. The checks were drawn on the accounts of Skyproof Manufacturing, Inc., a Florida corporation that was held out as a manufacturer of roof trusses for mobile homes (Pet. App. 1a-2a; J.A. 10-23).

Respondent and Cummings initially were represented by a single attorney, Arnold D. Levine of Tampa, Florida. Prior to trial, however, Levine moved to withdraw as counsel for respondent on the ground that the interests of Cummings and respondent were in conflict. Respondent filed a pro se opposition to the motion to withdraw. After the motion was filed, the court appointed another attorney, Chris Colston, to represent respondent, subject to the possibility of relieving Colston if the court declined to grant Levine's motion to withdraw (J.A. 24-27).

At a hearing on the motion to withdraw, held on June 19, 1980, respondent attempted to establish that Levine actually sought to withdraw because of a dispute over

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[1] The court of appeals' opinion erroneously states that respondent was indicted for mail fraud and unlawful use of a fictitious name in violation of 1341 and 1342 (Pet. App. 1a), apparently substituting 18 U.S.C. 1342 for 18 U.S.C. 2, the aiding and abetting statute. We made the same error in the certiorari petition (Pet. 2).

fees (J.A. 27-31). After the hearing had progressed for a short period, the court concluded that there was indeed a conflict of interest and hostility between respondent on the one hand and Levine and Cummings on the other, and it therefore granted Levine's motion to withdraw (J.A. 31-32).

The trial previously had been scheduled to begin on June 30, 1980, some 11 days after the hearing (J.A. 32-33). At the hearing, however, respondent informed the court of his view that he could not receive a fair defense if Colston were given only "one or two weeks to prepare" for trial (J.A. 33). Levine told the court that Colston would need 30 days to prepare (J.A. 35), and Colston requested that a minimum of 30 days be allowed (J.A. 35). The court granted a continuance, but decided to cut the continuance "a few days short" of the 30 days requested by Colston so that the trial would commence on the first day of the court's July docket (J.A. 35). The record does not disclose that Colston or respondent thereafter raised any further objection to the July 14 trial date, which was 25 days from the date of the hearing.

Colston stated at the hearing on Levine's motion to withdraw that the United States Attorney's Office had granted him access to the files in the postal inspector's office the previous day (J.A. 35), and the Assistant United States Attorney reiterated at the hearing that the responsible postal inspection official was prepared to meet with Colston at the latter's convenience for discovery purposes (J.A. 36). At the close of the hearing, respondent informed the court that he had spoken with Colston and that Colston had "been most helpful" (J.A. 38), but respondent pointed out that Colston's specialty was real estate law and that Colston had previously been involved in only one federal criminal case. The court replied that if respondent intended by this observation to request that he be permitted to select his own lawyer to be appointed by the court, that request was denied. The court explained that Colston was "very bright" and that he had been selected from an alphabetical list of lawyers

in the district who were qualified and screened for this purpose (J.A. 38).

2.a. When the trial commenced as scheduled on July 14, 1980, the court asked Colston whether respondent was "ready," and Colston said "yes" (Tr. 3). Another attorney, Ryland Rivas, was present to assist Colston in his representation of respondent at trial (Tr. 2).

The government introduced evidence establishing the existence of the check-kiting scheme between Skyproof accounts in banks in Tampa and Norman, with the checks cleared by the use of the mails through intermediate banks (J.A. 44-46, 48-52, 58-59, 62-64; Tr. 110-113, 114-130, 134-148, 150-151, 152-160, 167-184, 227-255, 261-283, 323-324). As a result of these transactions, the Norman Bank of Commerce suffered a loss of approximately $484,000 (J.A. 51; Tr. 176, 300, 448). The checks were signed by co-defendant Cummings, who was formally the president of Skyproof, but the evidence showed that respondent directed the affairs of Skyproof (J.A. 49-50, 68, 73; Tr. 169-172, 186, 223-224, 304-307, 318, 320, 340-343). Respondent had not been identified as an officer or owner of the company because of prior difficulties with the Internal Revenue Service and unfavorable publicity about prior business dealings (Tr. 475). Cummings testified that although she was president of Skyproof, respondent directed its affairs, conceived of the check-kiting scheme, and instructed her to sign checks (J.A. 83-84; Tr. 479-488, 491-492, 494-496, 505, 508, 510-512). Co-defendant Wylie Merritt, an accountant residing in Norman who participated in some of the transactions, also testified that respondent was the true head of Skyproof and had directed its affairs (Tr. 365, 368, 370, 373, 382, 389, 392, 394-395).[2]

b. Colston's trial strategy, as the court of appeals observed, consisted in large part of "putting the govern-

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[2] Cummings pleaded guilty to three counts of the indictment prior to trial (J.A. 87), and the government agreed to dismiss the indictment against Merritt if he testified truthfully at trial (J.A. 77-78).

ment to its proofs, pointing an accusatory finger at one of the allegedly defrauded banks, and arguing that the bank's toleration of overdrafts was an informal extension of credit to a legitimate business" (Pet. App. 2a). Colston's questions to employees of the Norman Bank of Commerce suggested that, because the bank's lending capability was based upon the total amount of deposits on its books, the Bank had condoned the deposit of overdrafts that it believed would be made good later (J.A. 66-67; Tr. 443).

In an effort to disassociate respondent from both the check-kiting transactions and the business entity used in perpetrating the fraud, Colston, during cross-examination, elicited testimony that Cummings had executed the checks, that the officials of the banks involved had never heard of respondent, and that Cummings, not respondent, was the president and sole stockholder of Skyproof (J.A. 46-47, 53-56, 61-62, 65, 68, 73-74, 77, 80; Tr. 108, 204-206). Colston also sought to establish that although the indictment alleged that Skyproof was merely a sham, the corporation in fact was a legitimate and growing business concern and thus would have had a lawful reason to conduct a large volume of transactions by check (J.A. 70-71, 79, 87). In addition, although bank employees testified on direct examination that in the normal course of business checks were transmitted by express mail to clearinghouses for collection, those employees admitted on cross-examination by Colston that they had no personal knowledge that the specific overdrafts at issue in this case actually were sent through the mails (J.A. 47-48; Tr. 149-150, 151-152, 160-162). Finally, Colston's questioning of the government's principal witnesses, co-defendants Merritt and Cummings, established that both would derive substantial benefits with respect to the charges pending against them as a result of their testimony against respondent (J.A. 77-78, 79, 90-91). Colston also pursued each of these defense theories during his closing argument (J.A. 97-103).

c. At the close of the government's case, the defense made a motion to dismiss the indictment on the ground

that the government had failed to establish any case against respondent. The district court denied the motion, concluding that the evidence presented a question for the jury (J.A. 94). The court previously had granted respondent's motion to subpoena seven witnesses, and the record indicates that at least some of those witnesses were present at the time of trial (J.A. 97). Colston informed the court, however, that the defense would not call any witness (J.A. 94). During this conference with the judge, the following colloquy occurred regarding Colston's performance (J.A. 94-95):

> THE COURT: * * * This young man, Colston, I think, has done a tremendous job representing you.
> [RESPONDENT]: I agree, certainly agree.
> THE COURT: You acted at one time that you weren't happy, but that was earlier when you hadn't seen him in action.
> [RESPONDENT]: I am certainly glad you overruled me.
> THE COURT: He's a very fine young lawyer and this other young man over there too. * * *

The court then explained to respondent that he had the right to testify or not to testify, that if he did testify he would be subject to cross-examination on the basis of a prior conviction in Tampa for giving a false statement to a bank, and that he was entitled to have the jury instructed that no adverse inference should be drawn from his failure to testify (J.A. 95-97). Respondent stated that he would defer to counsel on whether the instruction should be given (J.A. 95) and agreed that it should be. After discussing the possible use of the prior conviction, the court determined that respondent's decision not to take the stand was made intelligently, with knowledge of all the options (J.A. 96-97). Immediately thereafter, a further exchange occurred regarding the performance of defense counsel (J.A. 97):

> THE COURT: I want to make a record on one thing I forgot, but the second after the Court Reporter left in there, [respondent] expressed his personal appreciation of these lawyers for the good

> work they have done and he wanted to make it a part of the record.
>
> [RESPONDENT]: I would also like to state the reason I went up to Mr. Colston's office yesterday was so that Mr. Emery, his senior law partner, would know that before I either won or lost.

After Colston expressed his satisfaction with the jury instructions, the court similarly stated to Colston and co-counsel Rivas (J.A. 104):

> Well, boys, I want to tell you again I appreciate you two, you know, this guy couldn't have got a better representation if he had hired someone in Florida or Oklahoma City or anyplace else and I appreciate it.

After deliberating for 2¼ hours, the jury returned a verdict of guilty on 11 counts and not guilty on two counts (Tr. 601).[3] On August 28, 1980, respondent was sentenced to a total of 25 years' imprisonment and a fine of $11,000 (Pet. App. 2a; J.A. 5).

3. The court of appeals reversed respondent's convictions on the ground that he was denied the effective assistance of counsel at trial (Pet. App. 2a). The court did so even though the district court had not conducted an evidentiary hearing or made factual findings concerning the effectiveness of counsel.[4] Nor did the court of appeals

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[3] After the court accepted the verdict, it briefly discussed the procedure regarding sentencing, observing that respondent could address the court personally and that his "very able lawyers" could speak for him as well (Tr. 603).

[4] On March 11, 1981, while the appeal was pending and more than six months after the judgment of conviction was entered, respondent filed a pro se motion for a new trial in which he alleged that he had received ineffective assistance of counsel, principally because of counsel's asserted failure to investigate certain matters. The district court denied the motion without reaching the merits because the case was pending on appeal. See Fed. R. Crim. P. 33. The court of appeals granted respondent's motion to file the new trial motion as a supplement to the record on appeal (J.A. 7),

find it significant that, as the government contended, there had been no showing that respondent's counsel had failed to exercise " 'the skill, judgment and diligence of a reasonably competent defense attorney' "—the standard utilized by the Tenth Circuit for evaluating claims of ineffective assistance of counsel (*id.* at 3a, quoting *Dyer* v. *Crisp*, 613 F.2d 275, 278 (en banc), cert. denied, 445 U.S. 945 (1980)). The court explained that under its prior decisions, "when circumstances hamper a given lawyer's preparation of [the case], the defendant need not show specified errors in the conduct of his defense in order to show ineffective assistance of counsel" (Pet. App. 3a). The court of appeals instead "inferred" that counsel's representation was inadequate by relying on five "circumstances" (Pet. App. 4a):

> (1) the time afforded for investigation and preparation; (2) the experience of counsel; (3) the gravity of the charge; (4) the complexity of possible defenses; and (5) the accessibility of witnesses to counsel.

The court of appeals did not independently assess the degree to which these factors actually indicated that defense counsel's performance in this case was seriously deficient; it simply compared the circumstances of this case with those of *United States* v. *King*, 664 F.2d 1171 (10th Cir. 1981), in which it likewise had "inferred" that the defendant had received ineffective assistance of counsel, and concluded that the same result should obtain here.

The court observed, for example, that Colston had 25 days to prepare for trial of a case that the government had developed over a 4½-year period, as compared with the 27 days available for preparation of a defense to the tax fraud charge in *King* that the government developed over a 3-year period. The court also noted that respond-

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but it did not rely on any of the allegations or materials in the motion in holding that respondent had received ineffective assistance of counsel.

ent faced a sentence of up to 65 years' imprisonment and actually was sentenced to 25 years, while in *King* the defendant faced a maximum sentence of only five years. The court of appeals further noted that while it had not discussed in *King* the matter of the accessibility of witnesses to counsel, here—although no defense witnesses testified at trial—the government's witnesses came from four states (Pet. App. 4a-5a). In addition, the court noted that respondent lived in Florida and Georgia and his lawyer lived in Oklahoma (*id.* at 5a).

The court did perceive a material distinction between this case and *King* in that the latter was more complex, involving approximately 200 witnesses and 5000 exhibits, as compared with 17 witnesses and 50 exhibits in this case (Pet. App. 2a, 5a). Nevertheless, the court observed that "[respondent's] case was not an ideal one for an aspiring criminal defense lawyer to cut his teeth on" (*ibid.*) because, in the court's view, " '[m]ail fraud cases tend to be factually and legally complex' " (*ibid.*, quoting *United States* v. *Golub*, 638 F.2d 185, 188 (10th Cir. 1980)). Finally, the court reasoned that if this case indeed was simpler than *King*, that advantage was offset by Colston's lack of experience in criminal trials (Pet. App. 5a).

4. The government filed a petition for rehearing with suggestion for rehearing en banc, noting that the claim of ineffective assistance of counsel had been raised for the first time on appeal and arguing, inter alia, that the claim should not be upheld without an evidentiary hearing. Pet. for Reh. 1-2. The government also pointed out (*id.* at 7-8) that Colston was assisted in his representation of respondent by another attorney, Ryland Rivas. In an affidavit appended to the government's petition for rehearing, Rivas stated that he had been admitted to practice in 1974 and that prior to 1980, the date of respondent's trial, he had had "extensive experience in the practice of criminal law and * * * had tried jury cases ranging from escape from the penitentiary to murder in

the 1st degree" (App. *infra*, 1a). Rivas also stated that he "assisted Mr. Chris Colston in his preparation of defense for [respondent] and was present during all stages in the proceedings to assist Mr. Colston with the preparation and drafting of motions, examination of witnesses and examination of all evidence available to Mr. Colston" (*ibid.*).

The government's petition for rehearing and suggestion of rehearing en banc were denied (Pet. App. 9a).

SUMMARY OF ARGUMENT

The court of appeals erred in reversing respondent's convictions on the ground that he received ineffective assistance of counsel, without finding that counsel committed any errors whatever or that respondent was prejudiced in any way by his attorney's representation.

A. A final judgment of conviction entered after a criminal trial at which the resources of society were concentrated to decide the guilt or innocence of the accused should not lightly be set aside on the basis of a subsequent trial of his lawyer's performance. The focus of the inquiry, rather, must be on whether the accused received a fair trial in light of the assistance rendered by counsel. Accordingly, where, as here, counsel was unfettered by improper external restraints, a court may not set aside a conviction on the basis of assertedly ineffective assistance of counsel unless it finds that counsel committed serious errors that substantially prejudiced the accused or fundamentally undermined the fairness of the proceedings. There are other measures available to legislatures, courts, law schools, and the organized bar to improve the quality of performance by defense counsel. That is not, however, the principal concern of a court considering the validity of a final judgment of conviction. Unless asserted defects in counsel's performance actually had an "impact on the criminal proceeding, * * * there is no basis for imposing a remedy in that proceeding." *United States* v. *Morrison*, 449 U.S. 361, 365 (1981).

There are, moreover, a number of mechanisms other than the Sixth Amendment for correcting serious errors that were overlooked in a criminal trial. Under Fed. R. Crim. P. 52(b), plain errors may be noticed on appeal even if counsel overlooked them at trial, and a new trial may be granted under Fed. R. Crim. P. 33 on the basis of newly discovered evidence. The Court also has made clear that victims of a fundamental miscarriage of justice ordinarily will be able to satisfy the "cause and prejudice" standard for overcoming a procedural default. In order to avoid circumvention of the standards governing the correction of error by these other mechanisms, a convicted defendant seeking relief on the ground of ineffective assistance of counsel must identify errors by his attorney that were at least as grave as the substantive errors that would warrant setting aside a conviction under those standards.

This conclusion is supported by a proper respect for the integrity of trial courts charged with the obligation to assure the availability of adequate assistance of counsel for defendants. In addition, the lawyer for the accused is an officer of the court who is ethically bound competently and zealously to advance the interests of his client, and a reviewing court must "start with a presumption that he was conscious of his duties to his clients and that he sought conscientiously to discharge those duties." *Matthews* v. *United States*, 518 F.2d 1245, 1246 (7th Cir. 1975) (Stevens, J.).

B. The evolution of the right to "effective" assistance of counsel confirms that a defendant must demonstrate serious error and substantial prejudice or unfairness. The concept of "effective" assistance finds it origins in *Powell* v. *Alabama*, 287 U.S. 45 (1932), in which the Court held that the duty to assign counsel was not discharged by appointment of an attorney so late in the case as to preclude the giving of effective aid in preparation and at trial. The Court since has held that other exter-

nal restraints on the ability of counsel to perform in his traditional role are invalid under the Sixth Amendment because they prevent the attorney from rendering "effective" assistance. See, *e.g.*, *Glasser* v. *United States*, 315 U.S. 60 (1942) (conflict of interest); *Geders* v. *United States*, 425 U.S. 80 (1976) (prohibition against consultation with defendant during overnight recess). The Court has treated these cases as involving the functional equivalent of a total denial of the right to counsel, and it accordingly has reversed the convictions without requiring any specific showing of what the attorney would have done if he had been free of the external restraint or the degree to which the accused was prejudiced as a result, just as it did in the case of a total denial of counsel in *Gideon* v. *Wainwright*, 372 U.S. 335 (1963). Where the alleged "ineffectiveness" of counsel stems not from external restraints, but from the inadequacy of counsel's own performance, the errors likewise must be equivalent in their gravity to a denial of the "Assistance of Counsel" to which the Sixth Amendment explicitly refers.

The Court's decision in *McMann* v. *Richardson*, 397 U.S. 759 (1970), supports this conclusion. There the Court indirectly addressed the question of the competence of counsel in holding that a guilty plea could not be set aside as unintelligently made unless the defendant received advice that was not merely mistaken but outside the range of competence demanded of attorneys in criminal cases. By identifying the ultimate issue to be whether the plea was intelligently made, *McMann* indicates that the primary focus must be on the rights of the accused, not the actions of his attorney. Advice so deficient that it renders a guilty plea unintelligent clearly can be said to have substantially prejudiced the accused and led to a fundamentally unfair result; *McMann* thereby supports the view that this should be the perspective of the courts in ineffectiveness cases generally.

At a minimum, *McMann* and the general thrust of the subsequent decisions of the courts of appeals require that the convicted defendant identify specific and serious derelictions by counsel that fell below the minimum level of performance of reasonably competent counsel and materially prejudiced the accused. The court of appeals erred in reversing respondent's convictions without making such a finding here.

C. The circumstances relied upon by the court of appeals were wholly insufficient to support what it termed an "inference" that respondent received ineffective assistance of counsel. Clearly it cannot be said that the 25 days counsel was allowed prior to trial precluded him from consulting with respondent and preparing the defense, so that a conclusive presumption of ineffective assistance of counsel could be justified under the rationale of *Powell* v. *Alabama*. This Court's decisions in *Avery* v. *Alabama*, 308 U.S. 444 (1940), and *Chambers* v. *Maroney*, 399 U.S. 42, 53-54 (1970), foreclose such a conclusion. Furthermore, the district court in fact *granted* respondent's request for a continuance to allow him time to prepare for trial, although it cut the continuance a few days short to accommodate the trial date to the court's schedule. It was entirely reasonable for the court to take this course, especially since counsel proclaimed at the outset of trial that he was ready to proceed.

Nor did attorney Colston's lack of prior experience in criminal trials warrant reversal of the conviction without a showing that this inexperience in turn led to specific errors in conducting the defense. Indeed, the district court and respondent expressed enthusiastic approval of Colston's performance. The court of appeals also overlooked the fact that Colston was assisted by another attorney who apparently had extensive prior experience in criminal trials.

In addition, whatever the validity of the court of appeals' view that mail fraud cases generally "tend" to be

complex, the court pointed to nothing to suggest that *this* case was too complex for Colston and his colleague to grasp in the time allowed. The fact that respondent faced up to 65 years' imprisonment merely reflected that he was indicted on 13 separate counts of mail fraud arising out of the same course of conduct, each of which carried a maximum five-year term of imprisonment. And, finally, there is no indication that the location of the government's witnesses in several different states and respondent's residence in Florida and Georgia had any effect on counsel's preparation of the case.

D. The court of appeals erred in believing that because circumstances "hampered" counsel's preparation, respondent should be excused from showing that counsel's performance was not within the range of competence demanded of defense counsel. The factual premise for the court's ruling is unsupported, because there was no finding that counsel in fact were in any way "hampered" in their preparation. But even if there were time or other constraints on their performance, the same probably could be said of the performance by defense counsel in most criminal trials. If the asserted lack of preparation or understanding of certain aspects of the case actually affected the trial, respondent should be capable of identifying the acts or omissions that resulted. The court of appeals failed to find any such errors, however, and its judgment therefore must be reversed.

ARGUMENT

THE COURT OF APPEALS ERRED IN VACATING RESPONDENT'S CONVICTIONS ON THE GROUND OF INEFFECTIVE ASSISTANCE OF COUNSEL, BECAUSE THE COURT DID NOT FIND THAT COUNSEL'S ACTUAL PERFORMANCE WAS DEFICIENT IN ANY RESPECT

The Sixth Amendment provides that "[i]n all criminal prosecutions, the accused shall enjoy the right * * * to have the Assistance of Counsel for his defence." The explicit requirement of the Amendment of course was satisfied in this case, because respondent was represented by counsel in his prosecution for mail fraud. Indeed, he was assisted by two lawyers, one of whom—according to an uncontradicted affidavit filed by the government in the court of appeals (App., *infra*, 1a)—had extensive experience in criminal trials.

The court of appeals nevertheless held that respondent was denied his Sixth Amendment right because, in the court's view, the assistance of counsel respondent concededly received must be deemed to have been "inadequate" or "ineffective" (Pet. App. 4a-5a). Yet in vacating respondent's convictions on this ground, the court did not point to *any* error committed by counsel, much less conclude that any such error was of a kind or magnitude that it caused counsel's performance to fall below some minimally acceptable level of competence for a lawyer in a criminal case or deprived respondent of a fair trial. Nor did the court find that any error by counsel—assuming there was error—had a probable effect on the outcome of the prosecution or substantially prejudiced the defense.

Where, as here, the timing or other circumstances of an attorney's appointment were not such as to require a conclusive presumption by the reviewing court that an attorney would be unable to prepare and conduct an adequate defense (compare *Powell* v. *Alabama*, 287 U.S. 45,

71 (1932)), the court may set aside a conviction on the ground of inadequate assistance of counsel only if it finds specific "gross errors" or "serious derelictions" by counsel in his actual handling of the case that caused his representation to fall below the range of competence demanded of attorneys in criminal cases (*McMann* v. *Richardson*, 397 U.S. 759, 772, 774 (1970)) and further finds that the defendant suffered substantial prejudice as a result (see, *e.g.*, *Chambers* v. *Maroney*, 399 U.S. 42, 53-54 (1970)). Because respondent has not established, and the courts below did not find, that counsel committed any such errors or that respondent was prejudiced by counsel's performance (the court of appeals reversed respondent's convictions without even providing for an evidentiary hearing on these matters), the judgment of the court of appeals should be reversed and respondent's convictions reinstated.[5]

A. No Claim Of Ineffective Assistance Of Counsel Should Be Entertained Unless Serious Derelictions By Counsel Are Shown That Substantially Prejudiced The Defense

A number of considerations pertaining to the nature and purposes of an inquiry into counsel's performance at trial strongly suggest that where counsel was unfettered by external restraints on his ability to fulfill a lawyer's traditional role, a court may set aside a conviction on the basis of assertedly ineffective assistance of counsel only upon a showing of serious errors that substantially prejudiced the accused or fundamentally undermined the fairness of the proceedings.

1. As relevant here, the Sixth Amendment provides only that "the accused shall enjoy the right * * * to have the Assistance of Counsel for his defence." It does not

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[5] This disposition would not forclose respondent from raising more specific allegations of constitutionally inadequate assistance of counsel in a collateral attack on his convictions under 28 U.S.C. 2255, if a concrete basis exists for such a claim.

state that whatever assistance of counsel the accused receives must be "effective." That word instead has been used by the courts to describe certain features of the right to counsel as that right has evolved judicially over the years.

The word "effective" has a number of different meanings in ordinary usage, and it has been employed to describe somewhat different concepts in Sixth Amendment doctrine. Indeed, the nature of an inquiry into a lawyer's performance may vary considerably depending upon the meaning given to the term. For example, if the word "effective" were understood to mean "productive of results," [6] then an attorney's performance might be deemed "ineffective" whenever he failed to secure an acquittal for his client. But of course it never has been suggested that the Sixth Amendment guarantees that the defense put forward by counsel will succeed.

Similarly, if the word were given certain other of its accepted meanings—*e.g.*, "impressive," "cogent," "pleasing," or "satisfying" [7]—the concept of "effective" counsel would suggest an attorney who is especially articulate and forceful, has a commanding presence in court, and possesses a personal demeanor that inspires the confidence of his client and others. But although these characteristics surely are conducive to success in the legal profession, the Sixth Amendment just as surely was not intended to constitutionalize such vague and elusive elements of a lawyer's human nature and professional style, any more than it was intended to guarantee the development of a "meaningful relationship" between attorney and client. See *Morris* v. *Slappy*, No. 81-1095 (Apr. 20, 1983), slip op. 11-12. Nor would it be practicable for a court reliably to evaluate a lawyer's performance against such amorphous standards. Cf. *id.* at 12.

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[6] See *Webster's Third New International Dictionary* 724 (4th ed. 1976), definition 1a.

[7] See *Webster's Third New International Dictionary* 724 (4th ed. 1976), definitions 2c and d.

Moreover, a view of "effective" assistance of counsel for Sixth Amendment purposes that focused principally on the attributes of counsel would improperly transform the Sixth Amendment inquiry from an assessment of whether the accused received a fair trial in light of the assistance counsel rendered to a more detached assessment of the skills and performance of the lawyer in their own right—as if the purpose of the inquiry were to grade the lawyer's participation in an advocacy seminar or to identify areas in which the lawyer might benefit from personal or professional improvement. Such an approach would not comport with the respect due the criminal trial itself as the "decisive and portentous event" (*Wainwright* v. *Sykes*, 433 U.S. 72, 90 (1977)).

The trial of a criminal case concentrates society's resources at one "time and place in order to decide, within the limits of human fallibility, the question of guilt or innocence." *Ibid.* "Every trial presents a myriad of possible claims," and—whether as a result of trial strategy, ignorance, the pressures of trial, or other factors—it is virtually inevitable that counsel in the normal course will overlook or choose to omit certain claims while pursuing others. *Engle* v. *Isaac*, 456 U.S. 107, 128-129 & n.34, 133-134 (1982). The Constitution therefore does not, and realistically could not, require that defense counsel recognize and raise every potentially meritorious claim on behalf of the accused. *Id.* at 134; *Wainwright* v. *Sykes*, *supra*, 433 U.S. at 91; *Estelle* v. *Williams*, 425 U.S. 501, 512-513 (1976); *id.* at 514-515 (Powell, J., concurring); cf. *Jones* v. *Barnes*, No. 81-1794 (July 5, 1983); *United States* v. *Agurs*, 427 U.S. 97, 102 n.5 (1976). As the Court recently observed, "taking into account the reality of the human fallibility of the participants, there can be no such thing as an error-free, perfect trial." *United States* v. *Hasting*, No. 81-1463 (May 23, 1983), slip op. 9. Due regard for the finality of a judgment of conviction in our imperfect adversary system of criminal justice therefore "presupposes * * * that

the trial of a criminal defendant will not inevitably be followed by a trial of his attorney's performance." *Wainwright* v. *Sykes*, *supra*, 433 U.S. at 114 n.13 (Brennan, J., dissenting). Such a practice would "detract[] from the [criminal] trial's significance" (*Engle* v. *Isaac*, *supra*, 456 U.S. at 128-129).[8] An examination into the performance of counsel therefore is appropriate only upon allegations of specific, serious errors in counsel's performance that assertedly detracted from the trial's fairness.

2. There is, of course, a substantial public interest in assuring that the attorneys who represent defendants in criminal prosecutions are capable of providing adequate assistance. Courts, legislatures, the organized bar, and

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[8] Unduly intrusive scrutiny of defense strategy in the course of considering a post-conviction claim of ineffective assistance of counsel also could dampen the ardor of defense counsel and require a potentially unseemly probing of the relationship and communications between attorney and client, thereby undermining the sense of mutual trust in criminal cases generally. *Cf. Polk County* v. *Dodson*, 454 F.2d 312, 324 & n.17 (1981); *United States* v. *Decoster*, 624 F.2d 196, 208-209 (D.C. Cir.) (en banc) (plurality opinion), cert. denied, 444 U.S. 944 (1979); *id.* at 228-229 (MacKinnon, J., concurring). "The effect on the [defense bar] would be demoralizing. And the interests of the clients and the cause of justice would be poorly served." *Upjohn Co.* v. *United States*, 449 U.S. 383, 398 (1981), quoting *Hickman* v. *Taylor*, 329 U.S. 495, 510-511 (1947); see also *FTC* v. *Grolier, Inc.*, No. 82-372 (June 6, 1983), slip op. 4-5. Such inquiries also could undermine the constitutionally required independence of defense counsel (see *Polk County*, *supra*, 454 U.S. at 318-319, 321-322; *Estelle* v. *Williams*, *supra*, 425 U.S. at 512) by inducing courts and prosecutors to oversee and second-guess judgments by defense counsel in order to protect the conviction from later attack on the basis of ineffective assistance of counsel. *Decoster*, *supra*, 624 F.2d at 208 (plurality opinion); *id.* at 228-229 (MacKinnon, J., concurring); Bines, *Remedying Ineffective Representation in Criminal Cases: Departures From Habeas Corpus*, 59 Va. L. Rev. 927, 961 (1973). See also Schwarzer, *Dealing With Incompetent Counsel—The Trial Judge's Role*, 93 Harv. L. Rev. 633, 650 (1980); but see *id.* at 651-665; Note, *A Fuctional Analysis of the Effective Assistance of Counsel*, 80 Colum. L. Rev. 1053, 1069 (1980).

law schools have a variety of measures at their disposal to address this issue—such as requiring special preparation or certification for members of the criminal defense bar, mandatory participation in programs of continuing legal education, formulation of professional standards to guide defense counsel, and institution of disciplinary proceedings in situations in which an attorney has acted unprofessionally or incompetently.[9]

The concern of a court considering the validity of a final judgment of conviction in a criminal prosecution, however, is far narrower. Its function is not to improve the level of performance of the defense bar generally or even of the individual lawyer who appeared at trial in the particular proceeding, but to determine whether the substantial rights of the accused were violated. If asserted defects in defense counsel's performance did not have an "impact on the criminal proceeding, * * * there is no basis for imposing a remedy in that proceeding." *United States* v. *Morrison*, 449 U.S. 361, 365 (1981). Cf. *United States* v. *Hasting*, *supra*, [redacted] slip op. 6-8 & n.5.

3. It also must be stressed that there are a number of available mechanisms other than the Sixth Amendment to remedy alleged defects in a criminal trial. Under Fed. R. Crim. P. 52(b), a court of appeals may correct "[p]lain errors or defects affecting substantial rights" even though they were not raised in the district court.

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[9] See Burger, *The Special Skills Of Advocacy: Are Specialized Training And Certification of Advocates Essential To Our System Of Justice?* 42 Fordham L. Rev. 227 (1973).

In Oklahoma, where respondent was tried, the State Supreme Court has not hesitated to discipline attorneys for neglect of their duties to their clients. See, *e.g.*, *State ex rel. Oklahoma Bar Ass'n* v. *Bell*, 637 P.2d 1258 (1981); *State ex rel. Oklahoma Bar Ass'n* v. *Peveto*, 620 P.2d 392 (1980); *Oklahoma Bar Ass'n* v. *Denney*, 617 P.2d 1351 (1980); see also *State ex rel. Oklahoma Bar Ass'n* v. *Raskin*, 642 P.2d 262 (1982). In addition, Rule 4(j), W.D. Okla. (effective Aug. 1, 1982) establishes a procedure for disciplining attorneys.

This rule "was intended to afford a means for the prompt redress of miscarriages of justice." *United States* v. *Frady*, 456 U.S. 152, 163 (1982) (footnote omitted). It permits a court of appeals to reverse a conviction when a trial was "infected with error so 'plain' the trial judge and prosecutor were derelict in countenancing it, even absent the defendant's timely assistance in detecting it." *Ibid.* Many truly serious errors committed by counsel at trial that could result in a miscarriage of justice may be corrected on appeal under this rule.

Moreover, if evidence was not introduced at trial, a defendant may move for a new trial under Fed. R. Crim. P. 33 on the basis of newly discovered evidence.[10] And a person convicted of a federal or state crime may present on collateral attack a claim that was not raised at trial or on appeal if he establishes "cause" for that default and substantial "prejudice" resulting from the error. *Engle* v. *Isaac*, *supra*; *United States* v. *Frady*, *supra*. The Court in *Engle* v. *Isaac* stressed its confidence that "victims of a fundamental miscarriage of justice will meet the cause-and-prejudice standard" and that "fundamentally unjust incarceration" will be remedied as a result. 456 U.S. at 134. See also *Wainwright* v. *Sykes*, *supra*, 433 U.S. at 90-91.

In view of these established mechanisms for correcting serious errors in criminal proceedings, it presumably

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[10] Under established case law, in order to obtain a new trial on the basis of newly discovered evidence, the defendant must show, inter alia, that the evidence, if available at trial, probably would have resulted in an acquittal (see *United States* v. *Agurs*, *supra*, 427 U.S. at 111 & n.19) and that the evidence could not have been discovered in the exercise of due diligence. See generally 8 J. Moore, W. Taggart & J. Wicker, *Moore's Federal Practice* ¶ 33.03[1] (2d ed. 1982). Although ordinarily a defendant must be bound by his attorney's actions, if the attorney's failure to discover certain evidence was a gross dereliction under all the circumstances, the defendant might well be excused from the conseqeunces of his attorney's lack of due diligence, although he still would have to satisfy the other requirements under the Rule.

would not be necessary in many cases for a court to entertain an independent claim of ineffective assistance of counsel in order to remedy substantial unfairness in the proceedings. But if these established mechanisms are not available in a particular case (perhaps because of a procedural default), the defendant must, in order to obtain relief under the Sixth Amendment on the ground that counsel's performance was inadequate, demonstrate errors by counsel that are at least equally as grave as the substantive errors that would warrant setting aside a conviction under the "plain error" rule on direct appeal, granting a motion for a new trial because newly discovered evidence probably would have resulted in an acquittal, or finding "cause" and "prejudice" sufficient to excuse a procedural default.[11] Otherwise a convicted defendant whose substantive claim would be barred because of a procedural default would be permitted—indeed encouraged—to raise that claim indirectly by recasting it as an attack on his lawyer's performance. See, *e.g.*, *Cooper* v. *Fitzharris*, 586 F.2d 1325, 1333 (9th Cir. 1978) (en banc).[12]

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[11] Because the errors complained of in this category of cases result from the actions of independent counsel, not from governmental actions of the court or prosecutor, there can be no claim that a lesser showing would be appropriate because of a need to deter unlawful governmental conduct or even because of governmental participation in or responsibility for the conduct involved. Compare *United States* v. *Agurs*, *supra*, 427 U.S. at 111; *United States* v. *Valenzuela-Bernal*, No. 81-450 (July 2, 1982), slip op. 7, 10, 14-15; *id.* at 2, 5 (O'Connor, J., concurring in the judgment). See *United States* v. *Green*, 680 F.2d 183, 188-189 (D.C. Cir. 1982), cert. denied, No. 82-5552 (Feb. 22, 1983); *Decoster*, *supra*, 624 F.2d at 214 (plurality opinion); *Washington* v. *Strickland*, 693 F.2d 1243, 1260 (5th Cir. 1982), cert. granted, No. 82-1554 (June 6, 1983).

[12] This conclusion is consistent with the relationship between attorney and client in a criminal case. The Sixth Amendment "speaks of the 'assistance' of counsel, and an assistant, however expert, is still an assistant." *Faretta* v. *California*, 422 U.S. 806, 820 (1975). When a defendant chooses to have a lawyer manage and present his case, law and tradition may allocate to the counsel

4. The soundness of this conclusion is reinforced by a proper respect for the integrity of the criminal justice system and the performance of defense counsel who participate in that system. By admitting an attorney to the practice of law before it, a court has determined that the attorney possesses the necessary qualifications and competence to perform his duties. And in providing for the appointment of counsel to represent the accused—in this case, pursuant to a plan adopted under the Criminal Justice Act of 1964, 18 U.S.C. (& Supp. V) 3006A—the court must be presumed to have conscientiously performed its obligation to assure the availability of adequate assistance of counsel for the defense. See *Polk County* v. *Dodson*, 454 U.S. 312, 322 (1981); cf. *Schweiker* v. *McClure*, 456 U.S. 188, 197 n.11, 200 (1982); *Mathews* v. *Eldridge*, 424 U.S. 319, 349 (1976).

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the power to make binding decisions on all but such fundamental matters as whether to plead guilty, waive a jury, testify, or take an appeal. *Id.* at 860. See *Jones* v. *Barnes*, No. 81-1794 (July 5, 1983), slip op. 8. The lawyer makes those decisions, however, not in his own right, but as the representative of the accused; the defense the lawyer presents accordingly is, in contemplation of law, that of the accused personally. *Faretta*, *supra*, 422 U.S. at 820-821. The defendant therefore must be bound by his attorney's conduct of the trial "except where 'the circumstances are exceptional' " (*Wainwright* v. *Sykes*, *supra*, 433 U.S. at 91 n.14, quoting *Henry* v. *Mississippi*, 379 U.S. 443, 451 (1965); see also *Jones* v. *Barnes*, *supra*, slip op. 5 (Brennan, J., dissenting)). In the present setting, the defendant must be bound unless the attorney's actions so depart from the range of competence and standards of fairness that define the scope of the agency relationship established by law between attorney and client in criminal cases that they cannot justly be deemed the actions of the defendant. Compare *McMann* v. *Richardson*, *supra* (guilty plea may be set aside where attorney's advice caused client's guilty plea not to be intelligent), with *Estelle* v. *Williams*, *supra*, 425 U.S. at 512-513 & n.9; *id.* at 514-515 & n.4 (Powell, J., concurring) (defendant bound by attorney's failure to object to his being tried in prison clothes, whether that failure resulted from a tactical choice, indifference, or procedural default). See also *Engle* v. *Isaac*, *supra*, 456 U.S. at 134.

In addition, the lawyer for the accused in a criminal prosecution is an officer of the court and is bound by ethical obligations of the profession to assume responsibility only for cases that he is competent to handle, to prepare adequately, and to represent his client zealously and without neglect of the interests of his client. See Model Code of Professional Responsibility DR 6-101(A), 7-101(A) (1978);[13] *Polk County*, *supra*, 454 U.S. at 318, 321, 323. Just as it must be presumed that a judge will fulfill his obligation to be an impartial decisionmaker (cf. *Youngberg* v. *Romeo*, 457 U.S. 307, 323 (1982); *Schweiker* v. *McClure*, *supra*, 456 U.S. at 195; *United States* v. *Morgan*, 313 U.S. 409, 421 (1941)), a court that is asked to consider a claim that counsel has failed to discharge his professional responsibilities must "start with a presumption that he was conscious of his duties to his clients and that he sought conscientiously to discharge those duties." *Matthews* v. *United States*, 518 F.2d 1245, 1246 (7th Cir. 1975) (Stevens, J.). See *Michel* v. *Louisiana*, 350 U.S. 91, 101 (1955); *Cuyler* v. *Sullivan*, 446 U.S. 335, 346-347 (1980); *Washington* v. *Strickland*, 693 F.2d 1243 (5th Cir. 1982) (en banc), cert. granted, No. 82-1554 (June 6, 1983); *Tinlin* v. *Parratt*, 680 F.2d 48, 50 (8th Cir. 1982). A strong showing must be made to overcome these presumptions.

5. For all of the foregoing reasons, we submit that reversal of a criminal conviction because of asserted inadequacies in counsel's representation is appropriate only if specifically identifiable errors caused counsel's performance to depart substantially from what reasonably may be expected of an ordinary fallible lawyer, and if those

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[13] These Disciplinary Rules have been adopted by the Oklahoma Supreme Court to govern the conduct of the members of the Bar of that State (Okla. Stat. Ann. tit. 5, ch. 1 App. 3 (West Cum. Supp. 1982), and they have been adopted and are enforceable as standards of conduct for attorneys in the federal district court in which respondent was convicted. See note 9, *supra*.

errors were equivalent in their gravity to a denial of the "Assistance of Counsel" to which the Sixth Amendment explicitly refers. This requires a showing that counsel's errors resulted in substantial prejudice to the accused or otherwise fundamentally undermined the fairness of the proceedings against him. The Court's decision in *McMann* v. *Richardson*, *supra*, supports this formulation. See pages 31-32, 34, *infra*. Moreover, as we explain below, the structure and purposes of the Sixth Amendment and the origins and development of the judicially fashioned concept of effective assistance of counsel confirm that this is the appropriate nature of the inquiry into the adequacy of the assistance rendered by counsel.

B. The Origins And Evolution Of The Right To "Effective" Assistance Of Counsel Confirm The Soundness Of Requiring A Showing Of Serious Error And Substantial Prejudice Or Unfairness

1. *The Explicit Textual Guarantee*

The Sixth Amendment guarantees a variety of rights to the accused in a criminal prosecution: to have a "speedy and public trial" and an "impartial jury"; "to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; [and] to have compulsory process for obtaining witnesses in his favor * * *." These rights are personal to the accused and "guarantee that a criminal charge may be answered in a manner now considered fundamental to the fair administration of American justice"; they "constitutionalize[] the right in an adversary criminal trial to make a defense as we know it." *Faretta* v. *California*, 422 U.S. 806, 818 (1975). The Sixth Amendment right of the accused to "have the Assistance of Counsel for his defence" supplements this design. It permits the accused to receive advice concerning the nature of the charges against him and the law and facts relevant to his case, and it enables counsel, as the personal representative of the accused, to present the accused's defense to the

charges and to meet the case presented by the professional prosecutor. *Id.* at 820-821.

As this Court has observed, "[t]here is considerable doubt that the Sixth Amendment itself, as originally drafted by the Framers of the Bill of Rights, contemplated any guarantee other than the right of an accused in a criminal prosecution * * * to employ a lawyer to assist in his defense." *Scott* v. *Illinois*, 440 U.S. 367, 370 (1979). Cf. *Powell* v. *Alabama*, *supra*, 287 U.S. at 68. This narrow concept obviously did not require any particular level of competence of whatever lawyer the accused chose to hire. That was essentially a private matter between attorney and client.

Over time, of course, the availability of the assistance of counsel came to be viewed as an essential attribute of a fair trial, because the accused ordinarily lacks the professional training and skill necessary to present a defense.[14] Accordingly, this Court has held that if an accused facing imprisonment upon conviction is financially unable to retain counsel, the government must assure that an attorney is appointed to assist him, unless he knowingly and intelligently waives his right to counsel. If counsel has not been furnished in these circumstances, the conviction will be reversed without requiring the convicted defendant to make a specific showing of what an attorney would have done in the case or the prejudice that resulted from counsel's absence.[15] The government's role in providing counsel is limited, however. Once appointed counsel has undertaken to represent the accused, he assumes the role of a "personal counselor and advo-

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[14] See, *e.g.*, *Johnson* v. *Zerbst*, 304 U.S. 458, 462-463 (1938), quoting *Powell* v. *Alabama*, *supra*, 287 U.S. at 68-69; *Gideon* v. *Wainwright*, 372 U.S. 335, 343-345 (1963); *Argersinger* v. *Hamlin*, 407 U.S. 25, 31 (1972); *Faretta* v. *California*, *supra*, 422 U.S. at 832-833; *United States* v. *Morrison*, *supra*, 449 U.S. at 365.

[15] *Johnson* v. *Zerbst*, *supra*; *Gideon* v. *Wainwright*, *supra*; see also *Faretta* v. *California*, *supra*, 422 U.S. at 832-835; *Argersinger* v. *Hamlin*, *supra*; *Scott* v. *Illinois*, *supra*.

cate." *Polk County, supra*, 454 U.S. at 318. This is "essentially a private function, traditionally filled by retained counsel" (*id.* at 319). See also *id.* at 327 (Burger, C.J., concurring).

2. *Use Of The Term "Effective" To Connote An Implicit Requirement That Counsel Be Free From External Restraints*

This Court has made clear, of course, that the mandate of the Sixth Amendment that the accused have the assistance of counsel is not automatically satisfied by the mere formal appointment of counsel. See *Cuyler* v. *Sullivan, supra*, 446 U.S. at 334. In *Powell* v. *Alabama, supra*, the Court held that the duty to assign counsel "is not discharged by an assignment at such time or under such circumstances as to *preclude* the giving of effective aid in the preparation and trial of the case." 287 U.S. at 71 (emphasis added). The Court there held that the defendants were not accorded the right to counsel in any "substantial" or "real" sense because the trial court initially had appointed all of the members of the local bar—and therefore effectively no lawyer at all—to assist the defendants in advance of trial, and no individual lawyer had assumed responsibility for the case until a few moments prior to trial, when there remained no opportunity for consultation or investigation. *Id.* at 57-58, 71. Although counsel thus was formally designated for the defendants, the Court held that this was not the "effective appointment of counsel" required by the Constitution (*id.* at 57, 58), and it accordingly reversed the convictions without an inquiry into the specific actions counsel might have taken if given an opportunity to consult and prepare or whether the defendants were prejudiced by the constructive denial of the assistance of counsel.

The use of the term "effective" in connection with the right to counsel finds its roots in these passages in *Powell*.[16]

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[16] See S. Krantz, *Right to Counsel in Criminal Cases* 166 (1976); *Decoster, supra*, 624 F.2d at 201 n.13 (plurality opinion).

It is evident, however, that the Court used the word "effective" to mean "actual" or "capable of having its normal effect" [17]—*i.e.*, to stress that the trial court must make an appointment of counsel under circumstances that permit counsel to render actual assistance that is capable of having its normal effect in aiding the accused, as distinguished from the sham or merely formal appointment in *Powell* itself, which did not provide any realistic opportunity for the defendants to benefit from an attorney's presence. The focus of the Court's concern thus was on removing an externally imposed restraint, virtually total in its effect, on counsel's ability to perform in his traditional role. The Court did not use the word "effective" to suggest a judicially fashioned standard of performance for an attorney who was free of such state-imposed restraints. Similarly, in *Avery* v. *Alabama*, 308 U.S. 444 (1940), the Court, citing *Powell*, observed that "the denial of *opportunity* for appointed counsel to confer, to consult with the accused and to prepare his defense could convert the appointment of counsel into a sham and nothing more than a formal compliance with the Constitution's requirement that an accused be given the assistance of counsel" (*id.* at 446) (emphasis added).[18]

The Court also has found a Sixth Amendment violation resulting from other governmentally imposed restrictions on the ability of counsel to function in his traditional role or to make reasonable tactical judgments at trial. See *Geders* v. *United States*, 425 U.S. 80 (1976) (prohibition against consultation with defendant during overnight recess); *Herring* v. *New York*, 422 U.S. 853 (1975) (denial of right of summation in nonjury trial); *Brooks*

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[17] See *Webster's Third New International Dictionary* 724 (4th ed. 1976), definitions 1b and 4.

[18] See also *Reece* v. *Georgia*, 350 U.S. 85, 90 (1955); *House* v. *Mayo*, 324 U.S. 42, 46 (1945); *White* v. *Ragen*, 324 U.S. 760, 764 (1945); *Ex parte Hawk*, 321 U.S. 114, 115-116 (1944); cf. *Chandler* v. *Fretag*, 348 U.S. 3, 9-10 (1954). Compare *Morris* v. *Slappy*, *supra*, slip op. 9-10; *Chambers* v. *Maroney*, *supra*, 399 U.S. at 53.

v. *Tennessee*, 406 U.S. 605, 612-613 (1972) (requirement that defendant be first defense witness); *Ferguson* v. *Georgia*, 365 U.S. 570, 593-596 (1961) (prohibition against direct examination of defendant). Because the defendants in these cases were in effect entirely deprived of the assistance of counsel at a critical point in the prosecution, the Court, as in *Powell*, set aside the conviction without requiring any specific showing of how the accused was injured as a result.

A final category of cases in which the Court has found a denial of the right to "effective" assistance of counsel consists of those in which counsel had a conflict of interest that impaired his duty of undivided loyalty to the accused. In *Glasser* v. *United States*, 315 U.S. 60 (1942), the Court held that the defendant was denied his Sixth Amendment "right to have the effective assistance of counsel" (*id.* at 76) when the trial court required his attorney simultaneously to represent a co-defendant having conflicting interests, an arrangement that adversely affected the attorney's representation of the defendant (see *id.* at 72-75). The Court explained that just as the failure of the trial court in *Powell* to make "effective appointment of counsel" for the defendants so offended concepts of a fair hearing as to constitute a denial of due process, the assistance of counsel required by the Sixth Amendment "contemplates that such assistance be untrammeled and unimpaired by a court order requiring that [a] lawyer shall simultaneously represent conflicting interests." 315 U.S. at 70. Thus, in *Glasser*, as in *Powell*, the concept of "effective" assistance meant only freedom from externally imposed restraints on counsel's ability to perform in his traditional role. By equating the defect in *Glasser* with the failure in *Powell* to make an "effective appointment of counsel" (see 315 U.S. at 70), the Court viewed representation by a lawyer who has a conflict of interest as essentially the equivalent of no "Assistance of Counsel" at all within the contemplation of the Sixth Amendment. See also *Von Moltke* v. *Gillies*, 332 U.S. 708,

725-726 (1948) (opinion of Black, J.). In view of this fundamental defect, the *Glasser* Court set aside the conviction without inquiry into the degree to which the defendant had been prejudiced as a result, just as it had in *Powell*. See 315 U.S. at 75-76. Accord *Holloway* v. *Arkansas*, 435 U.S. 475, 481-483, 489 (1978); *Cuyler* v. *Sullivan*, *supra*, at 348-350.[19]

Powell, *Geders*, *Glasser*, and the related cases discussed above establish that the "Assistance of Counsel" guaranteed by the Sixth Amendment is assistance unfettered by external restraints that might materially impair the ability of counsel to carry out his traditional role in the adversary system. The Court has treated these cases as the functional equivalent of a total denial of the right to counsel, and it accordingly has reversed convictions where there have been improper external restraints on counsel's performance without requiring any specific showing of resulting prejudice, just as it did in the case of the complete denial of counsel in *Gideon*.[20] Such cases are, however, materially different from those in which it is alleged simply that counsel blundered.

3. *Use Of The Term "Effective" To Refer To The Nature Of Counsel's Performance Without Regard To External Restraints*

In recent years, the term "effective" has been employed by the lower courts to refer not simply to assistance of

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[19] In *Cuyler* v. *Sullivan*, the Court rejected the contention that there was no state action involved in the asserted conflict of interest because the defendants had chosen to be represented by the same retained counsel, concluding that "the failure of retained counsel to provide adequate representation can render a trial so fundamentally unfair as to violate the Fourteenth Amendment." 446 U.S. at 343; see also *id.* at 348.

[20] The court of appeals apparently believed that the instant case falls in the same category as *Powell*, *Geders*, and *Glasser*, for it did not require any showing that respondent's attorneys committed any specific errors or was prejudiced as a result. As we show below (see pages 35-47, *infra*), this conclusion was wholly unwarranted.

counsel that is free from improper external restraints, but rather to suggest a certain level of competence or performance of defense counsel. This Court has not directly addressed the circumstances under which the effectiveness of counsel's performance in this sense might furnish an independent basis under the Consitution for setting aside a conviction. However, in *McMann* v. *Richardson*, 397 U.S. 759 (1970), the Court did consider the quality of counsel's performance indirectly, insofar as it bore on the ultimate issue in the case: whether a guilty plea could be collaterally attacked on the ground that it allegedly was motivated by a prior coerced confession that the defendant feared might be used against him if he elected to go to trial. See 397 U.S. at 760, 769. The Court held that the only way in which the defendant could attack the validity of the guilty plea in such circumstances would be to show that it was not knowingly and intelligently made, and it stated that the plea would be regarded as not intelligently made only if the defendant could show that he "was incompetently advised by his attorney." 397 U.S. at 772. The Court observed in this regard that pleading guilty entails the inherent risk that the assessment of the facts and law by a reasonably competent attorney with respect to the admissibility of the confession might turn out to be mistaken. *Id.* at 770, 771. It therefore stressed that whether a plea was intelligently made depends not on whether a court would retrospectively consider counsel's advice to be right or wrong, "but on whether that advice was within the range of competence demanded of attorneys in criminal cases." *Id.* at 770.[21]

The *McMann* Court declined to furnish a more precise description of the acceptable range of competence of de-

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[21] Compare *Youngberg* v. *Romeo*, *supra*, 457 U.S. at 323 (footnotes omitted): "the decision, if made by a professional, is presumptively valid; liability may be imposed only when the decision by the professional is such a substantial departure from accepted professional judgment, practice, or standards as to demonstrate that the person responsible actually did not base the decision on such a judgment."

fense counsel for purposes of assessing the validity of a guilty plea, concluding that "the matter, for the most part, should be left to the good sense and discretion of the trial courts" (*id.* at 771). But the Court emphasized that in order to have his conviction set aside, the defendant must "demonstrate gross error" (*id.* at 772) or "serious derelictions on the part of counsel" (*id.* at 774). The Court has reiterated the approach in *McMann* in other guilty plea cases. See *Parker* v. *North Carolina*, 397 U.S. 790, 797 (1970); *Tollett* v. *Henderson*, 411 U.S. 258, 264, 266-268 (1973).

Because the ultimate issue in *McMann* was whether the guilty plea was intelligently made, not the adequacy of counsel's performance as such,[22] it is unclear to what extent *McMann* may be relied upon in formulating standards for setting aside a conviction on the basis of asserted inadequacies in counsel's performance standing alone. However, the courts of appeals, in attempting over the last decade to define the concept of ineffective assistance of counsel insofar as it refers to the level of counsel's competence, have for the most part sought guidance from the decision in *McMann*.

With the exception of the Second Circuit, the courts of appeals have ceased to articulate the test of ineffectiveness in terms of whether counsel's assistance rendered the trial a "farce and mockery of justice," [23] and they instead have adopted formulations that echo the "reasonable competence" or "range of competence" language in *McMann*.

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[22] Similarly, in *Michel* v. *Louisiana*, 350 U.S. 91, 100-101 (1955), the question whether the defendant received effective assistance of counsel was relevant to the extent it bore on the ultimate question whether the defendant had an adequate opportunity to object to the composition of the grand jury. See also *Reece* v. *Georgia*, 350 U.S. 85, 90 (1955).

[23] "A lack of effective assistance of counsel must be of such a kind as to shock the conscience of the Court and make the proceedings a farce and mockery of justice." *United States* v. *Wight*, 176 F.2d 376, 379 (2d Cir. 1949), cert. denied, 338 U.S. 950 (1950).

See *Romero* v. *United States*, No. 81-6463 (Oct. 12, 1982) (White, J., dissenting from denial of certiorari). But, again echoing *McMann*, the decisions of the courts of appeals generally stress that the defendant must show "gross" or "flagrant" error, "serious derelictions," or some comparable degree of mistake.[24] The courts of appeals also generally require a showing of prejudice, although there is some disagreement about the formulation of the prejudice element; that is the principal issue before the Court in *Strickland* v. *Washington*, cert. granted, No. 82-1554 (June 6, 1983).[25]

Because under the "reasonable competence" formulation the defendant still must show "serious derelictions" and resulting prejudice, it is not clear that the movement away from the "farce and mockery" language actually has changed the outcome in any significant number of cases, as the en banc Ninth and Tenth Circuits realized when they adopted a new formulation. See *Dyer* v. *Crisp*, 613 F.2d 275, 278, cert. denied, 445 U.S. 945 (1980); *Cooper* v. *Fitzharris*, *supra*, 586 F.2d 1329. Rather, as Judge Leventhal noted in his plurality opinion in *Decoster*, the differing language in the opinions may be little more than a "semantic merry-go-round." 624 F.2d at 206.

In any event, faithfulness to the text of the Sixth Amendment requires that before a conviction may be set aside because of asserted inadequacies in counsel's performance, the errors must be equivalent in their level of seriousness to an actual denial of the "Assistance of Counsel," to which the Amendment explicitly refers. As we have explained above, this has been the Court's approach in the other areas in which it has considered whether counsel's assistance was "effective." In *Powell* v. *Alabama*, for example, the Court concluded that al-

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[24] We have collected these cases from the federal courts of appeals in Appendix B, *infra*, 3a-6a.

[25] The federal appellate cases concerning the prejudice issue are collected in Appendix C, *infra*, 7a-10a.

though counsel had been formally assigned to represent the accused, there was in substance no "Assistance of Counsel" rendered because of the timing and circumstances of the appointment. There was, in other words, a constructive denial of the right to counsel. See *Decoster*, *supra*, 624 F.2d at 222 (MacKinnon, J., concurring). The defect in the conflict of interest cases, such as *Glasser* v. *United States* and *Cuyler* v. *Sullivan*, was analytically the same.

So too, in *McMann*, advice of counsel that is so deficient that it causes the client's guilty plea not even to be an intelligent act can be viewed as equivalent in its gravity to an outright denial of the "Assistance of Counsel." Moreover, because the ultimate question in *McMann* was whether counsel's advice rendered the defendant's guilty plea unintelligent, *McMann* supports the proposition that the primary focus of the inquiry must be on the substantial rights of the accused, rather than on the abilities and performance of the attorney in their own right.

The decision in *McMann* also is consistent with a requirement that the defendant show that any errors committed by counsel had a likely effect on the outcome of the prosecution or otherwise substantially prejudiced him and that the ultimate concern should be with the fairness of the proceedings. A defendant whose conviction has been shown to rest on a plea of guilty that was not intelligently made has sufficiently demonstrated that the actions of counsel had a probable effect on the outcome of the prosecution and substantially prejudiced him. The vacating of the judgment of conviction entered on the basis of that plea therefore would be an appropriately tailored remedy to remove the taint of counsel's incompetence. Compare *United States* v. *Hastings*, *supra*, slip op. 6-8; *United States* v. *Morrison*, *supra*, 449 U.S. at 364-365. And, finally, to preserve a conviction entered on the basis of a guilty plea that was not intelligently made would be "fundamentally unfair" to the accused, irrespective of whether derelictions of counsel or something else caused the problem.

There is, however, no need to determine in this case the precise nature of the inquiry into whether a conviction must be set aside because of asserted inadequacies in counsel's performance. At a minimum, *McMann* and the decisions of the lower courts require that the defendant identify specific and serious derelictions in counsel's performance and demonstrate some degree of prejudice as a result. Yet, in the instant case, the court of appeals reversed respondent's convictions on the ground of ineffective assistance of counsel without identifying *any* errors committed by attorneys Colston and Rivas in their representation of respondent, much less errors that caused their performance to fall below "the range of competence demanded of attorneys in criminal cases." Nor did the court demonstrate any resulting prejudice or unfairness to respondent. The court instead simply "inferred" that counsel's assistance was constitutionally inadequate based on the existence of certain "circumstances" that in themselves are not measures of the adequacy of a lawyer's actual performance. As we now explain, these factors are wholly inadequate to sustain respondent's burden of overcoming the presumption that his attorneys rendered competent assistance.

C. The Circumstances Relied Upon By The Court Of Appeals Do Not Support Its Finding Of Ineffectiveness

1. *There Was Adequate Time To Prepare For Trial*

In inferring that counsel rendered inadequate assistance, the court of appeals placed substantial reliance on the fact that counsel had 25 days to prepare for trial, a period of time the court apparently believed was insufficient. See Pet. App. 4a. The court's reliance on this factor is flatly inconsistent with prior decisions of this Court, including, most recently, *Morris* v. *Slappy*, *supra*.

In *Chambers* v. *Maroney*, the defendant claimed that the appearance on the day of his second trial of a Legal Aid Attorney other than the one who represented him at

his first trial was so belated that the attorney could not have furnished effective assistance of counsel. 399 U.S. at 53-54. The Court rejected this contention, noting that the defendant's claim of prejudice resulting from the substitution of counsel was "without substantial basis" and that the Court was "not disposed to fashion a *per se* rule requiring reversal of every conviction following tardy appointment of counsel" (*id.* at 54). See also *Morris* v. *Slappy*, *supra*, slip op. 9-10; *Mancusi* v. *Stubbs*, 408 U.S. 204, 214 (1972).

The substitution of counsel in this case a full 25 days prior to trial cannot be said to have been "tardy," especially when compared with the facts of *Chambers* v. *Maroney*; and as in *Chambers* v. *Maroney*, there was no finding by the courts below that respondent was at all prejudiced by the timing of the substitution of counsel and trial. Indeed, when Colston first was appointed to represent respondent, the date of the trial was postponed in response to Colston's request for a continuance. Colston requested that a minimum of 30 additional days be allowed prior to trial, but the court cut the continuance "a few days short" so that the trial could begin on the first day of the court's monthly docket (J.A. 35-36). No objection was lodged against this short reduction of the requested continuance, nor did respondent or counsel subsequently ask for a further continuance on the ground that inadequate time was available for trial preparation.

The Court observed in *Avery* v. *Alabama*, *supra*, 308 U.S. at 446, that "[s]ince the Constitution nowhere specifies any period which must intervene between the required appointment of counsel and trial, the fact, standing alone, that a continuance has been denied, does not constitute denial of the constitutional right to assistance of counsel." In *Avery* itself, moreover, the Court, in an unanimous opinion by Justice Black, sustained a state murder conviction in which the defendant was sentenced to death, even though the trial was held only three days after arraignment and appointment of counsel and despite the trial

court's denial of counsel's request for a continuance based on counsel's affidavits stating that they did not have sufficient time to prepare for trial. The Court noted that counsel had performed their duties well and that there was no indication that the attorneys could have done more had additional time been granted. 308 U.S. at 450, 452.

We may assume that the usual practice today would be to allow counsel more preparation time than the three days permitted in *Avery*, especially in a capital case.[26] Nevertheless, the decisions in *Avery* and *Chambers* v.

[26] The Speedy Trial Act, as amended in 1979 (Pub. L. No. 96-43, Section 2, 93 Stat. 327), provides that "[u]nless the defendant consents in writing to the contrary, the trial shall not commence less than thirty days from the date on which the defendant first appears through counsel or expresaly waives counsel and elects to proceed pro se." 18 U.S.C. (Supp. V) 3161(c)(2). The purpose of this provision is to ensure the defendant a minimum amount of preparation time in even the simplest case. See A. Partridge, *Legislative History of Title I of the Speedy Trial Act of 1974*, at 70-75 (Fed. Judicial Center 1980); *United States* v. *Mers*, 701 F.2d 1321, 1333 (11th Cir. 1983).

This requirement was fully satisfied here. Section 3161(c)(2) "guarantee[s] to the criminal defendant the right to a delay of at least 30 days between arraignment and trial". *United States* v. *Wooten*, 688 F.2d 941, 950-951 (4th Cir. 1982). Respondent appeared for arraignment with his retained counsel, Levine, on February 22, 1980, and his trial did not commence until July 14, 1980—almost five months later.

In addition to enacting the automatic 30-day trial preparation provision in 1979, Congress recognized that additional preparation time would be needed in some cases. Congress therefore also amended the Act (see Pub. L. No. 96-43, Section 5(c), 93 Stat. 328) to permit an additional discretionary continuance "in the ends of justice" to afford defense counsel "reasonable time necessary for effective preparation." 18 U.S.C. (Supp. V) 3161(h)(8)(B)(iv). This Section, however, does not alter the principles that the grant or denial of a continuance is a matter addressed to the sound discretion of the trial court and that denial of a request for a continuance warrants reversal only upon a showing of resulting prejudice. See *United States* v. *Brooks*, 697 F.2d 517, 522 (3d Cir. 1982); *United States* v. *Black*, 684 F.2d 481, 485 (7th Cir.), cert. denied, No. 82-5600 (Nov. 29, 1982); *United States* v. *Aviles*, 623 F.2d 1192, 1196 (7th Cir. 1980).

Maroney must foreclose any argument in this case that the scheduling of the trial—after the court *granted* all but a few days of the requested continuance—violated respondent's right to the assistance of counsel, at least without a showing, entirely absent here, of a clear abuse of discretion and substantial prejudice.[27] Indeed, the Tenth Circuit itself previously has recognized these principles in sustaining the *denial* of a continuance that was requested in order to allow counsel adequate time to prepare. *United States* v. *Gonzales-Palma*, 645 F.2d 844 (10th Cir.), cert. denied, 454 U.S. 861 (1981) (defendant must show "clear abuse of discretion resulting in manifest injustice"); *United States* v. *Schwanke*, 598 F.2d 575, 579 (10th Cir. 1979).

Just this past Term, this Court again stressed that "[t]rial judges necessarily require a great deal of latitude in scheduling trials," and that only an "unreasoning and arbitrary 'insistence upon expeditiousness in the face of a justifiable request for delay,' violates the right to the assistance of counsel." *Morris* v. *Slappy*, *supra*, slip op. 9-10, quoting *Ungar* v. *Sarafite*, 376 U.S. 575, 589 (1964). In the instant case, the trial court's accommodation of respondent's request for a continuance and the court's trial schedule was in no way "unreasoning and arbitrary." Furthermore, on the first day of trial, Colston stated that he was "ready" to proceed (Tr. 3). "In the face of the unequivocal and uncontradicted statement by a responsible officer of the court that he was fully prepared and 'ready' for trial," it was entirely proper for the court to proceed. *Morris* v. *Slappy*, *supra*, slip op. 10; see also *id.* at 4 (Brennan, J., concurring in the result).

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[27] See *United States* v. *Rodriguez-Ramos*, 704 F.2d 17 (1st Cir. 1983), petition for cert. pending, No. 82-1837; *United States* v. *Wuagneux*, 683 F.2d 1343, 1355-1356 (11st Cir. 1982), petition for cert. pending, No. 82-1687; *United States* v. *McDonald*, 672 F.2d 864 (11th Cir. 1982); *United States* v. *Badwan*, 624 F.2d 1228, 1231 (4th Cir. 1980), cert. denied, 449 U.S. 1124 (1981); *United States* v. *Berkwitt*, 619 F.2d 649, 659 (7th Cir. 1980).

2. *Counsel's Inexperience Did Not Justify A Finding Of Ineffectiveness*

The court of appeals also relied on the fact that attorney Colston did not have prior experience—at least substantial experience—in criminal trials. Pet. App. 5a. We do not dispute that inexperience is a factor that in turn could contribute to a lawyer's rendering inadequate assistance and that a trial court should assure itself that the attorney assigned to represent a defendant is capable of doing so.[28] "Nonetheless, in determining whether there has been effective assistance, the primary focus must be on how well counsel performed in the particular case, not on how much experience counsel had. Counsel may sometimes compensate for their lack of experience by unusual zeal and industry. Moreover, courts recognize that 'law school does not endow the young lawyer with all of the skills, abilities and "know-how" of the experienced advocate' and that the young attorney 'must gain experience somewhere, somehow, and sometime.'" *Harris* v. *Housewright*, 697 F.2d 202, 205 (8th Cir. 1982) (citations and footnote omitted), quoting *Smotherman* v. *Beto*, 276 F. Supp. 579, 589 (N.D. Tex. 1967).

Accordingly, where counsel was inexperienced, the defendant nevertheless is not entitled to relief unless he can show an "actual adverse impact upon the fairness of the trial resulting from counsel's lack of trial experience" or "specific omissions by counsel indicating a lack of preparation and degree of skill reasonably required of counsel in a criminal case." *Daniels* v. *Maggio*, 669 F.2d 1075, 1082 (5th Cir. 1982), cert denied, No. 81-6858 (Nov. 1, 1982).[29] The court of appeals in this

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[28] See Project on Standards for Criminal Justice, Standard Relating to Providing Defense Service § 2.2 and commentary at 27-29 (Approved Draft 1968).

[29] See also *United States* v. *Badolato*, 701 F.2d 915, 926 (11th Cir. 1983); *United States* v. *Easter*, 539 F.2d 663, 666 (8th Cir. 1976), cert. denied, 434 U.S. 844 (1977); *United States ex rel. Williams* v. *Twomey*, 510 F.2d 634, 638-639 (7th Cir.), cert. denied, 423 U.S. 876 (1975).

case made no finding that Colston's lack of experience in criminal trials in turn caused his performance to fall below the range of competence required of attorneys in criminal cases or even that it caused him to commit any errors at all. Indeed, as we have recited in the Statement (see pages 6-7, *supra*), the trial judge—who, unlike the court of appeals, had an opportunity to observe Colston and Rivas—repeatedly praised their performance (J.A. 94-97, 104). So did respondent (J.A. 94-95, 97), until the jury returned a verdict of guilty (J.A. 97).

The court of appeals also ignored the fact that Colston was assisted by Rivas, who, according to an uncontradicted affidavit filed by the government in the court of appeals, had extensive prior experience in criminal cases (App. A, *infra*, 1a).[30] This indicates that to the extent

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[30] The court of appeals' failure to consider the role of Rivas, and the government's need to rely on an affidavit filed in the court of appeals, highlight the inappropriateness of deciding a claim of incompetent assistance of counsel on direct appeal, without the benefit of an evidentiary record. Resolution of a claim of ineffective assistance of counsel often depends on the circumstances of the particular case, including the facts known to the accused and counsel as well as counsel's reasons for taking or not taking certain actions. An evidentiary record ordinarily would have to be developed on these points before a court could conclude that counsel's assistance had been ineffective. (A court might more readily *reject* a claim of ineffective assistance without a hearing, at least where no substantial claim of prejudice is made. See *Chambers* v. *Maroney*, *supra*, 399 U.S. at 59).

For this reason, other courts of appeals have recognized that claims of ineffective assistance of counsel should be presented to the district court in the first instance, either in a motion for a new trial (if made within the time limits permitted by Fed. R. Crim. P. 33) or in a proceeding under 28 U.S.C. 2255. See *United States* v. *Frankenberry*, 696 F.2d 239, 242 (3d Cir. 1982), cert. denied, No. 82-6256 (June 27, 1983); *United States* v. *Badolato*, *supra*, 701 F.2d at 925; *United States* v. *Strum*, 671 F.2d 749, 750-751 (3d Cir.), cert. denied, No. 81-6689 (Oct. 4, 1982); *United States* v. *Lurz*, 666 F.2d 69, 78 (4th Cir. 1981), cert. denied, 455 U.S. 1005 (1982); *United States* v. *Barham*, 666 F.2d 521, 524 (5th Cir.), cert. denied, 456 U.S. 947 (1982); *United States* v. *Phillips*, 664

Colston might have believed it would be unwise for him to handle respondent's defense by himself, he fulfilled his ethical obligation by associating an experienced attorney with him in the case. See Model Code of Professional Responsibility DR 6-101(A)(1) (1978); Project on Standards for Criminal Justice, Standards Relating to Providing Defense Services § 2.2 comment f (Approved Draft 1968).

3. *The Finding Of Ineffectiveness Was Not Justified By The Complexity Of The Case*

The court of appeals made no substantial effort to assess the complexity of this case or the ability of Colston and Rivas to grasp it in the time allowed. The Court simply counted the number of witnesses (17) and exhibits (50) in the case, and, on that basis, found it to be "apparently" less complex than the trial involved in its prior decision in *United States* v. *King*, *supra*, in which there had been 200 witnesses and 5000 exhibits. Pet. App. 5a. But the court did not find the comparatively less complexity to be a reason for a different result here, because, in the court's view, this case "was not an

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F.2d 971 (5th Cir. 1981), cert. denied, 457 U.S. 1136 (1982); *United States* v. *Aulet*, 618 F.2d 182, 185-186 (2d Cir. 1980); *United States* v. *Payton*, 615 F.2d 922, 925 (1st Cir.), cert. denied, 446 U.S. 969 (1980); *United States* v. *Gray*, 611 F.2d 194, 197 (7th Cir. 1979), cert. denied, 446 U.S. 911 (1980).

Because no evidentiary record had been developed in this case, the court of appeals, if it was not prepared to reject respondent's unsubstantiated claims altogether, should have declined to reach the issue, without prejudice to respondent's raising it in a proceeding under 28 U.S.C. 2255. This clearly is a more appropriate procedure when a claim of ineffective assistance of counsel is raised for the first time on appeal than remanding to the district court for further proceedings, as the Tenth Circuit did in *United States* v. *Golub*, 638 F.2d 185 (1980). After proceedings on remand in *Golub*, the court of appeals reversed its prior decision and reinstated the conviction (694 F.2d 207 (1982)), but in the meanwhile the finality of the conviction had been delayed for more than two years.

ideal one for an aspiring criminal defense lawyer to cut his teeth on," since " '[m]ail fraud cases tend to be factually and legally complex.' " Pet. App. 5a, quoting *United States* v. *Golub*, *supra*, 638 F.2d at 188. This reasoning is wholly unsatisfactory.

The question before the court of appeals was not whether this was an "ideal" case for Colston to handle, but rather whether respondent received constitutionally adequate legal assistance. The court of appeals pointed to nothing to suggest that he did not, and it also overlooked the assistance that respondent and Colston received from Rivas, who evidently was an experienced—not "aspiring"—criminal defense lawyer, and who therefore presumably was capable of handling cases that were not "ideal."

Nor was it significant whether mail fraud cases generally "tend" to be complex. The offense of mail fraud broadly embraces any fraudulent scheme or artifice—regardless of complexity or simplicity—coupled with use of the mails "for the purpose of executing such scheme." 18 U.S.C. 1341. See, *e.g.*, *United States* v. *Maze*, 414 U.S. 395, 400 (1974); *Pereira* v. *United States*, 347 U.S. 1, 8 (1954). The relevant inquiry therefore was whether *this* case was too complex to be prepared for trial within 25 days. Plainly it was not. As we have explained in the Statement (see page 4, *supra*), the fraud established by the government's evidence consisted of a relatively simple check-kiting scheme involving a series of similar transactions. Counsel apparently concluded that the only plausible defenses were to disassociate respondent from the check writing or to dispel the inference of fraudulent intent, and Colston pursued both of these lines of defense. No one has suggested the availability of any markedly superior line of defense. Moreover, neither the government's case nor the defense presented to that case raised issues of unusual complexity or required extensive experience in defending fraud cases.

4. *The Gravity Of The Charges Does Not Justify The Finding Of Ineffectiveness*

The court of appeals observed that respondent faced a sentence of up to 65 years' imprisonment and in fact was sentenced to a term of 25 years, as compared with the five-year sentence faced by the defendant in *King*. It is not apparent why the court of appeals believed that this comparison of the two cases supported an "inference" of ineffective assistance of counsel in the instant case. Respondent faced a maximum of 65 years imprisonment only because he was charged with a course of conduct involving 13 separate counts of mail fraud, each of which carried a maximum five-year sentence. See 18 U.S.C. 1341. Moreover, this Court has recognized that the difficulty of a case and the need for the special skills of counsel are not necessarily proportional to the severity of the potential sentence. See *Argersinger* v. *Hamlin*, *supra*, 407 U.S. at 33-34, 36-37; *id.* at 41 (Burger, C.J., concurring in the result); *id.* at 47-48 (Powell, J., concurring in the result).

It may well be that in common practice, a lawyer would—and should—devote particular effort to a case in which the consequences of conviction are severe. But even if the Sixth Amendment could be said to impose a somewhat more exacting standard of attorney performance when the potential penalty is unusually severe—a principle that would be difficult to interpret and apply[31]—there

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[31] The Fifth Circuit, in rejecting the contention that a higher standard for gauging competence should apply to capital cases or cases in which the defendant is exposed to lengthy confinement, observed that "[r]ecognition of a sliding scale for th[e] constitutional standard [of ineffective assistance of counsel] would also suggest, for example, that a defendant charged with aggravated assault would be entitled to a more effective lawyer than one charged with simple assault or public intoxication. We decline to embark on such a treacherous path." *Washington* v. *Watkins*, 655 F.2d 1346, 1357 n.18 (1981), cert. denied, 456 U.S. 949 (1982). See also *Washington* v. *Strickland*, *supra*, 693 F.2d at 1250 n.12; cf. *Avery* v. *Alabama*, *supra*. While it is arguable that the qualitative difference

is no indication in this case that the efforts of Colston and Rivas were not appropriately commensurate to the gravity of the offense.

5. *The Location Of Witnesses Has Not Been Shown To Have Impaired The Effectiveness Of Respondent's Trial Counsel*

The final factor considered by the court of appeals was the accessibility of witnesses to counsel. Because this factor was not considered in *King*, the court of appeals was unable to compare the two cases on this point. The court therefore simply observed: "In [respondent's] case no defense witnesses appeared, but the government's witnesses came from four different states. [Respondent] lived in Florida and Georgia, his attorney in Oklahoma." Pet. App. 5a. This recitation—the court's complete discussion of the point—clearly lends no support to an inference of constitutionally inadequate assistance. There was no finding that Colston and Rivas in fact were unable to confer with respondent and interview witnesses or otherwise learn the substance of the information they possessed, or, if Colston and Rivas were unable to do so, that respondent was prejudiced as a result.

D. The Court Of Appeals Erred In Believing It Would Be Inappropriate To Require A Showing Of Specific Errors By Counsel

The court of appeals acknowledged that respondent had not shown that trial counsel had "failed to exercise 'the skill, judgment and diligence of a reasonably competent defense attorney', which is how the Sixth Amendment right to assistance of counsel is described in [the Tenth] Circuit." Pet. App. 3a, quoting *Dyer* v. *Crisp*, *supra*, 613

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in potential penalty in capital cases supports a higher standard for assessing the constitutional effectiveness of counsel's performance, we doubt it is justifiable to extend any such principle to cases on the basis of the length of the potential term of imprisonment that could result from conviction.

F.2d at 278. But it explained its decision to dispense with that requirement here, and instead to "infer" inadequate assistance based on the five factors discussed above, as follows (Pet. App. 3a):

> Cases after *Dyer* have established that when circumstances hamper a given lawyer's preparation of a defendant's case, the defendant need not show specified errors in the conduct of his defense in order to show ineffective assistance of counsel. See *United States* v. *King*, 664 F.2d 1171, 1172-73 (10th Cir. 1981); *United States* v. *Golub*, 638 F.2d 185, 187 (10th Cir. 1980). This is an eminently reasonable rule, for there is no way an appellate court can say precisely how a given case would have been handled by a reasonably diligent and properly prepared lawyer. The prejudice from lack of preparation and experience cannot be nicely weighed.

The factual premises on which the court rested its analysis are wholly unsubstantiated: there simply has been no showing or finding that Colston and Rivas's preparation of the case was at all "hampered" by circumstances; that there was a "lack of preparation" or (in light of Rivas' apparent prior experience in criminal cases) a "lack of * * * experience"; or that Colston and Rivas were not "reasonably diligent and properly prepared lawyer[s]." There was, accordingly, no reason on this record for the court to invoke a novel Sixth Amendment rule that dispenses with a requirement that the defendant show specific errors in counsel's performance and resulting prejudice. See *Morris* v. *Slappy*, *supra*, slip op. 12-13; *id.* at 3 (Brennan, J., concurring in the result); *id.* at 1 (Blackmun, J., concurring in the judgment).

In any event, the court of appeals' analysis would be gravely flawed even if its factual premises were correct. A factual determination that circumstances did bring some temporal or other pressures to bear on the attorneys in their preparation of the case would not serve to distinguish this case from most criminal cases. In light

of this reality, it is clear that "[n]ot every restriction on counsel's time or opportunity to investigate or to consult with his client or otherwise to prepare for trial violates a defendant's Sixth Amendment right to counsel." *Morris* v. *Slappy*, *supra*, slip op. 9. As we have explained above (see pages 15, 27-28, 36-37, *supra*), only where the timing or other circumstances of counsel's appointment were such that an opportunity for consultation and preparation was precluded, as in *Powell* v. *Alabama*, may a court set aside a conviction without identifying specific errors by counsel and finding substantial prejudice to the accused as a result. Because this case in no way resembles *Powell* v. *Alabama* with regard to the timing of the appointment of counsel, the proper question in this case was not whether Colston and Rivas's preparation of the case was "hampered," but whether the representation respondent ultimately received was constitutionally adequate.

Nor, contrary to the court of appeals' apparent belief (see Pet. App. 3a), would it be inappropriate or unfair to require respondent to make a showing that his lawyers' performance was outside the range of competence demanded of attorneys in criminal cases. If the basis of a defendant's claim is that the lawyer who represented him did not adequately prepare, he should be capable of demonstrating the nature of counsel's omissions that resulted from the asserted lack of preparation—*e.g.*, by identifying a witness who should have been, but was not, interviewed and called to testify; evidence that might have been unearthed with greater diligence; motions or objections that would have been made by a more attentive lawyer; or a basis for impeaching government witnesses that might have been developed. See *Morris* v. *Slappy*, *supra*, slip op. 12-13 (Brennan, J., concurring in the result). This is information to which the defendant has or could develop access. Compare *United States* v. *Valenzuela-Bernal*, *supra*, slip op. 11-13, 14. If the defendant cannot make such a showing, then the asserted

lack of preparation cannot be said to have rendered counsel's assistance "ineffective," because it could not be shown even to have had an effect on the presentation of the defense.[32] The District of Columbia Circuit stressed this point in its seminal en banc decision in *United States* v. *Decoster, supra.* There the court rejected the dissenting judges' emphasis on specific duties of counsel in the abstract and held instead that an asserted failure to investigate—a concrete example of a failure to prepare that was shown there but was not found there—must be considered in terms of whether there was any resulting impact on the prospects for a successful defense at trial. 624 F.2d at 208-213, 215-217 (plurality opinion); *id.* at 232-234, 244-245 (concurring opinion). See also *Washington* v. *Strickland, supra,* 693 F.2d at 1258-1262.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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JOHN FICHTER DE PUE
Attorney

AUGUST 1983

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[32] Of course, the defendant also would have to show that any errors he did identify were "serious derelictions" and that he was substantially prejudiced as a result.

APPENDIX A

AFFIDAVIT OF RYLAND L. RIVAS

STATE OF OKLAHOMA)
) ss:
COUNTY OF GRADY)

The undersigned Affiant, by request of the United States Attorney's Office, Western District of Oklahoma, makes the following statements:

That he has been in the practice of law since May, 1974, and is admitted to the Bar of the State of Oklahoma, and is a member in good standing of the United States District Court for the Western District of Oklahoma and the U.S. Court of Appeals for the Tenth Circuit.

Affiant further states that prior to the year of 1980, he has had extensive experience in the practice of criminal law and has tried jury cases ranging from escape from the penitentiary to murder in the 1st degree. Affiant further states that he has attended numerous schools and continuing education courses regarding the trial of criminal matters including attendance of the National Criminal Defense Lawyers Trial Advocacy Program located in Houston, Texas.

Affiant further states that he assisted Mr. Chris Colston in his preparation of defense for Harrison Cronic and was present during all stages in the proceedings to assist Mr. Colston with the preparation and drafting of motions, examination of witnesses and examination of all evidence available to Mr. Colston.

Further Affiant saith not on this 20th day of May, 1982.

/s/ Ryland L. Rivas
RYLAND L. RIVAS

Subscribed and sworn to before me this 20th day of May, 1982.

/s/ Karen Bell
Notary Public

My Commission Expires:
October 16, 1983.

APPENDIX B

SURVEY OF THE DECISIONS OF THE COURTS OF APPEALS REGARDING THE STANDARD TO BE EMPLOYED IN ESTABLISHING INEFFECTIVE ASSISTANCE OF COUNSEL

DISTRICT OF COLUMBIA: *United States* v. *Decoster*, 624 F.2d 196, 208 (en banc) (plurality opinion), cert. denied, 444 U.S. 944 (1979) ("serious incompetency that falls measurably below the performance ordinarily expected of fallible lawyers"; "gross shortfall"): *United States* v. *Wood*, 628 F.2d 554, 559 (1980) (en banc) (same); *United States* v. *Green*, 680 F.2d 183, 188 (1982), cert. denied, No. 82-5552 (Feb. 22, 1983).

FIRST: *United States* v. *Bosch*, 584 F.2d 1113, 1121 (1978) ("reasonably competent assistance" standard is "shorthand" for "assistance within the range of competence expected of attorneys in criminal cases"; convicted defendant must show that error "clearly resulted from neglect or ignorance rather than from informed, professional deliberation"); *United States* v. *Talavera*, 668 F.2d 625, 632 (1982) (same); *United States* v. *Garcia*, 698 F.2d 31, 33-35 (1983) (same); *Cepulonis* v. *Ponte*, 699 F.2d 573, 575 (1983) (same).

SECOND: *United States* v. *Wight*, 176 F.2d 376, 379 (1949), cert. denied, 338 U.S. 950 (1950) ("farce and mockery"); *United States* v. *Helgesen*, 669 F.2d 69, 71, cert. denied, 456 U.S. 929 (1982) (same); *Langone* v. *Smith*, 682 F.2d 287 (1982) (same); *Solina* v. *United States*, 709 F.2d 160, 162 (1983) (same).

THIRD: *Moore* v. *United States*, 432 F.2d 730, 736, 738 (1970) (en banc) (citing *Restatement (Second) of Torts* § 299(a): counsel required to exercise "the customary skill and knowledge which normally prevails at the time and place"; noting failure of counsel adequately to pursue "fundamental issue" of identification); *United States* v. *Baynes*, 687 F.2d 659, 665 (1982) (same; fail-

ure to investigate a "critical source of potentially exculpatory evidence"); *United States ex rel. Caruso* v. *Zelinsky*, 689 F.2d 435, 438 (1982) (same; alleged failure of counsel to advise client of plea bargain would constitute a "gross deviation from professional standards").

FOURTH: *Marzullo* v. *Maryland*, 561 F.2d 540, 544 (1977), cert. denied, 435 U.S. 1011 (1978) (whether "defense counsel's representation [was] within the range of competence demanded of attorneys in criminal cases"; counsel's error must be "so flagrant" that a court can conclude that it "resulted from neglect or ignorance rather than from informed, professional deliberation"); *Taylor* v. *Starnes*, 650 F.2d 38, 41 (1981) (same); *Sneed* v. *Smith*, 670 F.2d 1348, 1353, 1355 (1982) (same); *Knight* v. *Johnson*, 699 F.2d 162, 166 (1983) ("within the range of competence demanded of attorneys in criminal cases").

FIFTH: *Akridge* v. *Hopper*, 545 F.2d 457, 459, cert. denied, 431 U.S. 941 (1977) (defendant must demonstrate that counsel's advice was not "within the range of competency demanded of attorneys in criminal cases"); *Winfrey* v. *Maggio*, 664 F.2d 550, 553 (1981) (same); *Washington* v. *Watkins*, 655 F.2d 1346, 1355 (1981) ("counsel reasonably likely to render *and rendering* reasonably effective assistance" (emphasis in original)); *Hayes* v. *Maggio*, 699 F.2d 198, 201 (1983) (same). *Boyd* v. *Estelle*, 661 F.2d 388, 389 (1981) (same; counsel's performance must be "seriously inadequate"); *Uptain* v. *United States*, 692 F.2d 8, 9-10 (1982) (same).

SIXTH: *Beasley* v. *United States*, 491 F.2d 687, 696 (1974) (assistance of counsel required by the Sixth Amendment is "counsel likely to render and rendering reasonably effective assistance"; "defense counsel must perform at least as well as a lawyer with ordinary training and skill in the criminal law and must conscientiously protect his client's interest"); *Poole* v. *Perini*, 659 F.2d 730, 736 (1981) (same); *United States* v. *Warner*, 690

F.2d 545, 555 (1982) (same); *United States* v. *Yelardy*, 567 F.2d 863, 865, 866 (1978) ("whether petitioner was deprived of rudimentary legal assistance"; "within the range of competence demanded of attorneys in criminal cases").

SEVENTH: *United States ex rel. Williams* v. *Twomey*, 510 F.2d 634, 641, cert. denied, 423 U.S. 876 (1975) ("legal assistance which meets a minimum standard of professional representation"; there is no presumption of failure to meet a constitutional standard merely because counsel made "egregious errors, tactical or strategic"); *Alicea* v. *Gagnon*, 675 F.2d 913, 926 (1982) ("legal assistance which meets a minimum standard of professional representation"); *United States ex rel. Cosey* v. *Wolff*, 682 F.2d 691, 693 (1982) (same); *Clay* v. *Director, Juvenile Division*, 631 F.2d 516, 522 (1980) ("within the range of competence demanded of attorneys in criminal cases"); *United States ex rel. Edwards* v. *Warden*, 676 F.2d 254, 258 (1982) ("within the reasonable range of professional competence constitutionally required"); *United States* v. *Weston*, 708 F.2d 302, 306 (1983) ("legal assistance which meets a minimum standard of professional representation"; defendant must establish "grossly incompetent professional conduct" or "representation which is in any aspect • • • shockingly inferior to what may be expected of the prosecution's representation").

EIGHTH: *Reynolds* v. *Mabry*, 574 F.2d 978 (1978) ("reasonably competent lawyer"); *Long* v. *Brewer*, 667 F.2d 742, 745 (1982) ("behavior of counsel falling measurably below that which might be expected from an ordinary fallible lawyer"; defendant must show "serious incompetency, inefficiency, or inattention of counsel"); *Walker* v. *Solem*, 687 F.2d 1235, 1236-1237 (1982) (same; "failed to perform an essential duty"); *White Hawk* v. *Solem*, 693 F.2d 825, 827 (1982) (same; "presumption that counsel has rendered effective assistance"; "gross error").

NINTH: *Cooper* v. *Fitzharris*, 586 F.2d 1325, 1330 (1978) (en banc), cert. denied, 440 U.S. 974 (1979) ("within the range of competence demanded of attorneys in criminal cases"; "serious dereliction"); *United States* v. *Sanford*, 673 F.2d 1070, 1073 (1982) (same); *United States* v. *Gibson*, 690 F.2d 697, 703-704 (1982) ("reasonably competent and effective counsel"; "within the range of competence demanded of criminal attorneys in reasonably difficult cases").

TENTH: *Dyer* v. *Crisp*, 613 F.2d 275, 278 (en banc), cert. denied, 445 U.S. 945 (1980) (counsel must "exercise the skill, judgment and diligence of a reasonably competent defense attorney"); *United States* v. *Golub*, 694 F.2d 207, 213 (1982) (same); *United States* v. *Glick*, 710 F.2d 639, 644 (1983) (same; court must determine whether attorney's performance fell below the standard).*

ELEVENTH: *Mylar* v. *Alabama*, 671 F.2d 1299, 1301 (1982), cert. denied, No. 81-2240 (July 6, 1983); (within the "range of competence demanded of attorneys in criminal cases"); *Stanley* v. *Zant*, 697 F.2d 955, 958 (1983) (same); an "objective assessment of whether trial counsel fell below acceptable professional standards in not advocating the underlying claim"); *Washington* v. *Strickland*, 693 F.2d 1243, 1250 (former 5th Cir. Unit B 1982) (en banc), petition for cert. granted, No. 82-1554 (June 6, 1983) ("counsel reasonably likely to render and rendering reasonably effective assistance given the totality of circumstances").

*** The Tenth Circuit decisions do not include the decision in the instant case or in *United States* v. *King*, 664 F.2d 1171 (1981), or *United States* v. *Golub*, 638 F.2d 185 (1980), rev'd, 694 F.2d 207 (1982), which did not require a showing of specific errors by counsel because of the court's view that counsel's preparation was hampered.**

APPENDIX C

SURVEY OF THE DECISIONS OF THE COURTS OF APPEALS REGARDING THE REQUIREMENT THAT PREJUDICE BE SHOWN TO OBTAIN RELIEF ON A CLAIM OF INEFFECTIVE ASSISTANCE OF COUNSEL

DISTRICT OF COLUMBIA: *United States* v. *Decoster*, 624 F.2d 196, 20[illegible] (en banc) (plurality opinion), cert. denied, 444 U.S. 944 (1979) (accused must demonstrate "a likelihood that counsel's inadequacy affected the outcome of the trial"); *id.* at 232 (MacKinnon, J., concurring) ("substantial unfair prejudice to his defense"); *United States* v. *Wood*, 628 F.2d 554, 559 (1980) (en banc) (must show that counsel's performance was "likely to have resulted in prejudice to appellant's case"); *United States* v. *Hinton*, 631 F.2d 769, 771 (1980) (must show "a likelihood that counsel's inadequacy prejudiced his defense"); *United States* v. *Patterson*, 652 F.2d 1046, 1048 (1981) ("[n]o counsel, however skillful, could have 'affected the outcome' of this case"); *United States* v. *Green*, 680 F.2d 183, 189 (1982), cert. denied, No. 82-5552 (Feb. 22, 1983) ("likelihood of effect on the outcome").

FIRST: *United States* v. *Ritch*, 583 F.2d 1179, 1183, cert. denied, 439 U.S. 970 (1978); (accused "bears the burden of establishing actual prejudice"); *United States* v. *Campa*, 679 F.2d 1006, 1014 (1982) (same).

SECOND: *LiPuma* v. *Commissioner, Dep't of Corrections*, 560 F.2d 84, 92, cert. denied, 434 U.S. 861 (1977) ("the prejudice resulting from counsel's alleged neglect must be actual and not merely possible"); *United States* v. *Aulet*, 618 F.2d 182, 188 (1980) (same).

THIRD: *United States ex rel. Johnson* v. *Johnson*, 531 F.2d 169, 177-178, cert. denied, 425 U.S. 997 (1976) (noting that petitioner was not prejudiced by counsel's failure to locate witness); *United States* v. *Baynes*, 687 F.2d 659, 670-671 (1982) (habeas corpus petitioner must "demonstrate that there is a 'reasonable possibility' that

had the error of which he complains not occurred, the jury might have arrived at a different outcome"; must "demonstrate that his attorney's ineffectiveness was not harmless beyond a reasonable doubt"); *United States ex rel. Caruso* v. *Zelinsky*, 689 F.2d 435, 438 (1982) ("accused must be prejudiced by counsel's incompetence before relief will be granted").

FOURTH: *Marzullo* v. *Maryland*, 561 F.2d 540, 546 (1977), cert. denied, 435 U.S. 1011 (1978) (failure of counsel to protect defendant from "prejudicial" reference to prior rape charge); *Taylor* v. *Starnes*, 650 F.2d 38, 41 (1981) (court cannot conclude that counsel's failure to request lesser included offense instruction was "harmless beyond a reasonable doubt"); *Via* v. *Superintendent, Powhatan Correctional Center*, 643 F.2d 167, 175 (1981) (noting that defendant was prejudiced by counsel's lack of preparation for trial, which led him to plead guilty).

FIFTH: *Washington* v. *Watkins*, 655 F.2d 1346, 1362 (1981) (noting that at time of the decision, it was "clear that *some* degree of prejudice must be shown," but that it was then "unclear as to the precise *degree* of prejudice that a defendant must demonstrate" (emphasis in original)); *Boyd* v. *Estelle*, 661 F.2d 388, 389 (1981) (relevant inquiry is "whether counsel's inadequacy prejudiced the fairness of his client's trial"); *Uptain* v. *United States*, 692 F.2d 8, 10 (1982) (same); *Rubio* v. *Estelle*, 689 F.2d 533, 535 (1982) (habeas corpus petitioner must show an "adverse impact upon the fairness of her trial resulting from [counsel's] lapse"); *Youngblood* v. *Maggio*, 696 F.2d 407, 409-410 (1983) (habeas petitioner must show counsel's performance "was so inadequate as to render his trial unfair").

SIXTH: *Beasley* v. *United States*, 491 F.2d 687, 696 (1974) ("Harmless error tests do not apply in regard to the deprivation of a procedural right so fundamental as the effective assistance of counsel"); *McKeldin* v. *Rose*, 631 F.2d 458, 460-461 (1980), cert. denied, 450 U.S. 969

(1981) (same); *Wiley* v. *Sowders*, 647 F.2d 642, 650, cert. denied, 454 U.S. 1091 (1981) ("question remains open whether an adjudication of ineffective assistance requires a showing that defense counsel's performance affected the outcome").

SEVENTH: *United States* v. *Berkwitt*, 619 F.2d 649, 659 (1980) (claim of ineffectiveness unsupported by "any specific instance of prejudice"); *United States* v. *Murzyn*, 631 F.2d 525, 534 (1980), cert. denied, 450 U.S. 923 (1981) ("in the absence of prejudice," counsel's failure to read leading entrapment decision was not ineffective assistance); *United States* v. *Berry*, 661 F.2d 618, 621 (1981) (noting that the evidence counsel elicited did not prejudice defendant); *Wade* v. *Franzen*, 678 F.2d 56, 59 (1982) ("harmless error" rule).

EIGHTH: *Long* v. *Brewer*, 667 F.2d 742, 745 (1982) (defendant must show "prejudice"—that he was "likely deprived * * * of an otherwise available, substantial ground of defense"); *Walker* v. *Solem*, 687 F.2d 1235, 1237 (1982) (defendant must show counsel's failure "prejudiced his defense"); *United States* v. *Kelly*, 687 F.2d 1217, 1219 (1982) (defendant must show that he "suffered material prejudice in the defense of his case"); *White Hawk* v. *Solem*, 693 F.2d 825, 827 (1982) (defendant must show "he was prejudiced by [counsel's] failure").

NINTH: *Cooper* v. *Fitzharris*, 586 F.2d 1325, 1331 (1978) (en banc), cert. denied, 440 U.S. 974 (1979) (relief granted "only if it appears that the defendant was prejudiced by counsel's conduct"); *Powell* v. *Spalding*, 679 F.2d 163, 167 (9th Cir. 1982) (same); *United States* v. *Gibson*, 690 F.2d 697, 704 (1982) (same); *Baumann* v. *United States*, 692 F.2d 565, 572 (1982) (same); *United States* v. *Altamirano*, 633 F.2d 147, 152-153 (1980), cert. denied, 454 U.S. 839 (1981) (counsel's many errors did not deprive defendant of a "fair trial"); *Fritchie* v. *McCarthy*, 664 F.2d 208, 214 (1981) ("touchstone" is whether defendant "received a fair trial").

TENTH: *Dyer* v. *Crisp*, 613 F.2d 275, 278 (en banc), cert. denied, 445 U.S. 945 (1980) (noting that defendant "was not prejudiced by trial mistakes"); *United States* v. *Porterfield*, 624 F.2d 122, 124-125 (1980) (where incompetence of counsel is "pervasive," the defendant is not required to prove "prejudice"; burden instead is on government to "establish the lack of prejudice"); *United States* v. *Payne*, 641 F.2d 866, 867-868 (1981) (noting the *Porterfield* holding that specific proof of prejudice is not required where incompetence is pervasive or in other unusual circumstances, but stating that this proposition is "questionable" in light of the subsequent decision in *United States* v. *Morrison*, 449 U.S. 361 (1981)); *United States* v. *Glick*, No. 82-1375 (June 10, 1983) slip op. 12-13 (quoting *United States* v. *Morrison*, *supra*: the court must "determine whether the inadequacy 'has had or threatens some adverse effect upon the effectiveness of counsel's representation or has produced some other prejudice to the defense' ").

ELEVENTH: *Washington* v. *Strickland*, 693 F.2d 1243, 1250 (former 5th Cir. Unit B 1982) (en banc), petition for cert. granted, No. 82-1554 (June 6, 1983) (petitioner "must show that ineffectiveness of counsel resulted in actual and substantial disadvantage to the cause of his defense").

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